Office - Supreme Court, U. S.
FILED
AUG 19 1949
CHARLES ELMORE CROPLEY
CLERK

No. 280

In the

Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC.
Petitioner

vs.

OSCAR R. EWING, Administrator, and
J. DONALD KINGSLEY, Acting Administrator,
FEDERAL SECURITY AGENCY, FOOD and DRUG
ADMINISTRATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

ALBERT E. STEPHAN,
711 Central Building,
Seattle 4, Washington,
Counsel for Petitioner.

GROSSCUP, AMBLER & STEPHAN,
711 Central Building,
Seattle 4, Washington,
Of Counsel.

Dated at Seattle, Washington, August 17, 1949.

THE ARGUS PRESS, SEATTLE

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC.
Petitioner,

vs.

OSCAR R. EWING, Administrator, and
J. DONALD KINGSLEY, Acting Administrator,
FEDERAL SECURITY AGENCY, FOOD and DRUG
ADMINISTRATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

ALBERT E. STEPHAN,
711 Central Building,
Seattle 4, Washington,
Counsel for Petitioner.

GROSSCUP, AMBLER & STEPHAN,
711 Central Building,
Seattle 4, Washington,
Of Counsel.

Dated at Seattle, Washington, August 17, 1949.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
I. Short Summary of Matter Involved	2
(a) Change Required in Name—Standard of Identity	2
(b) Change Required in Drained Weight—Standard of Fill	3
II. Summary of Decision of Court of Appeals	4
III. Jurisdiction	5
IV. Questions Presented	5
V. Reasons for Allowance of Writ	7
VI. Prayer	8
Brief in Support of Petition	9
I. Opinions Below	9
II. Statutes Involved	9
III. Summary Statement	9
IV. Specifications of Errors to be Urged	13
V. Statement of the Case	13
(a) Two Entirely Different Species of oysters are Canned	13
(b) History of Standard of Fill	15
(c) Biological and Processing Differences in Two Species Shown at 1947 Hearing	17
(d) Required Increase in Western Fill and Decrease in Southern Fill	19
(e) Lack of Substantial Evidence to Support Order	19
(f) Industry's Quality Deterioration Evidence Ignored	20
(g) Evidence of "Browning" and Other Quality Impairment Disregarded	20
(h) Southern Industry Did Not Challenge Western Evidence	21
(i) Sole Opposing Evidence Came From Administrator's Witnesses	21
(j) Interest of Consumers Ignored	22
(k) Presiding Officer Stripped of Power to Determine Credibility of Witnesses	22

Page

(l) The Making of the First Final Order..... 23
(m) Court of Appeals Remand of Proceeding to Administrator 23
(n) Improved Blanching Method of Preparing Canned Oysters Shown at Second Hearing, and Quality Deterioration That Results From Excessive Pack..... 24
(o) Only Opposing Evidence Again Came From Administrator's Witnesses..... 24
(p) Presiding Officer Again Stripped of Power to Determine Credibility of Witnesses 25
(q) Administrator's "Investigation and Enforcement" Officer, as Witness, and His Prosecuting Attorney, Prepare "Findings" Based on *ex parte* Weighing of their Own Evidence..... 25
(r) Presiding Officer's Refusal to Permit Either Cross-Examination or Offer of Proof to Show This Absence of "Fair Procedure" 26
VI. Argument 27
(a) The Agency's Procedure, Approved by the Lower Court, Calls for an Exercise of This Court's Power of Supervision. If Sanctioned it Would Nullify Requirements of "Fair Play" and Permit the Responsible Factfinder to Rubberstamp Work Prepared *Ex Parte* by One of the Adversary Witnesses 27
First, the Orders violate constitutional requirements of procedural due process.... 30
Second, the Orders violate the Administrative Procedure Act 30
Third, The Orders violate Congressional intent in enacting the Federal Food, Drug and Cosmetic Act..... 34
(b) The Decision of the Court of Appeals is in Conflict With Other Decisions of Other Courts of Appeals 36

Page

(c) The Decision of the Court of Appeals Presents Important Matters in the Administration of the Federal Food, Drug and Cosmetic Act, and in the Interpretation of the Administrative Procedure Act Which Have Not Been, but Should be, Determined by the Court 39

Conclusion 41

Appendix A — Statutes Involved:
Pertinent Portions of:
Federal Food, Drug and Cosmetic Act ..... Appendix, page 1
Administrative Procedure Act .. Appendix, page 3

TABLE OF AUTHORITIES CITED

Cases

Berkshire Employees Association v. N.L.R.B., 121 F.2d 235 (C.C.A. 3, 1941) 37

Carter v. Kubler, 320 U.S. 243 (1943) 88 L. ed. 26, 64 S. Ct. 1 30

Chicago Junction Case, 264 U.S. 258 (1924), 68 L. ed. 667, 47 S.Ct. 317 30

Columbia System v. United States, 316 U.S. 407 (1942), 86 L.ed. 1563, 62 S.Ct. 1194 34

Dorsey v. Kingsland, 173 F.2d 405 (1949) 37

Edison Co. v. N.L.R.B., 305 U.S. 197 (1938), 83 L.ed. 126, 59 S.Ct. 206 13

Kingsland v. Dorsey, ...U.S. ....., 69 S.Ct. 1160 (Adv. sh.) 37

Mahler v. Eby, 264 U.S. 32 (1924), 68 L.ed. 549, 44 S.Ct. 283 30

Maitland v. Zanga, 14 Wash. 92 (1896), 44 Pac. 117 28

Morgan v. United States, 298 U.S. 468 (1936), 80 L.ed. 1288, 56 S.Ct. 906 ..... 7, 13, 29, 30, 33

Morgan v. United States, 304 U.S. 1 (1938), 82 L. ed. 1129, 58 S.Ct. 773 ..... 5, 6, 13, 30, 36

National Labor Relations Board v. Phelps, 136 F. 2d 562 (C.C.A. 5, 1943) 40

Page

Ohio Bell Tel. Co. v. Comm., 301 U.S. 292 (1937), 81 L.ed. 1093, 57 S.Ct. 724 13
Powell v. United States, 300 U.S. 276 (1937), 81 L.ed. 643, 57 S.Ct. 470 34
Powhatan Mining Co. v. Ickes, 118 F.2d 105 (C.C. A. 6, 1941) 37
Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939) 13
Security Administrator v. Quaker Oats Co., 318 U.S. 218 (1943), 87 L.ed. 724, 63 S.Ct. 589 39
United States v. Abilene & So. Ry. Co., 265 U.S. 274 (1924), 68 L.ed. 1016, 44 S.Ct. 565 34

STATUTES

Administrative Procedure Act, 1946
60 Stat. 243, c. 324, 5 U.S.C.A. (Supp.) 1001 ..... 9, 31, 33
Section 5(c) 27, 31
Section 10(e) 37
Section 12 30
Federal Food, Drug and Cosmetic Act, 1938
52 Stat. 1040, c. 576, 21 U.S.C.A. 301 ..9, 33, 34, 36
Section 401 ..... 2, 4
701(e) 35
701(f) 35
701(f) (4) 5

MISCELLANEOUS

Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 31, 33
Attorney General's Manual on Administrative Procedure Act (1947) 31
Austern, Formulation of Mandatory Food Standards (1947), 2 Food Drug Cosmetic Law Quarterly 532 11
Best, Practical Aspects of Cereal Food Standardization (1948), 3 Food Drug Cosmetic Law Quarterly 204 12

Page

83 Cong. Rec. 7775, 7776, 9096, 9098, 9099..... 35, 36
Dunn, Food and Drug Laws (First ed. 1927, 3 vols.), Vol. 1 16
Dunn, Food, Drug and Cosmetic Act (G. E. Stechert & Co., New York, 1938)..... 36
Dunn, Index to Federal Food, Drug and Cosmetic Act (G. E. Stechert & Co., 1940)..... 36
Final Report of Attorney General's Committee on Administrative Law (1941), Sen. Doc. 8, 77th Cong., 1st Sess. 31, 32
Respondent's Brief before Court of Appeals..... 33
War Production Board Conservation Order No. M-81; 7 F.R. 947, 4836; 32 C.F.R. (Cum. Supp.) 9318 15

In the

Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC., *Petitioner*, vs. OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*	No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, Willapoint Oysters, Inc., prays that a writ of certiorari issue to review a final decree of the United States Court of Appeals for the Ninth Circuit, in the above entitled cause. The opinion and decree were entered on April 29, 1949, and a petition for rehearing, seasonably filed, was denied on June 3, 1949. (R. Vol. XI 1, 33; Vol. XII 1, 53).

I. SHORT SUMMARY OF MATTER INVOLVED

The decree of the Court of Appeals reversed in part, and affirmed in part, in accordance with its opinion, two certain final orders of the Administrator and of his deputy, the Acting Administrator, Federal Security agency, which had prescribed a *new* "definition and standard of *identity*"[1] and a *new* "standard of *fill*" for canned oysters, under §401 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. (Supp.) §341.

The two final orders directed two basic changes in lawful practices adhered to by Petitioner for more than twenty years under standards promulgated by Respondents and their predecessors, as follows:

(a) Change Required in Name—Standard of Identity. The orders would require petitioner (and other Western canners of oysters) to stop a long continued and lawful use on their can labels of the generic description

"OYSTERS"

and would require thereafter that such labels be changed to

"PACIFIC OYSTERS"

At the same time the orders would grant to all Southern canners of oysters, henceforth, the exclusive right to continue the use on their can labels of the generic description

"OYSTERS"

without any similar restrictive geographical limitation of source or species.

---

[1]Emphasis supplied herein unless otherwise noted.

(b) Change Required in Drained Weight—Standard of Fill.

The orders would compel petitioner (and other Western canners of oysters) to *increase* the historic cut-out or drained weight[2] of oyster meats from an existing 5-ounce standard for large Western oysters to a new requirement of 6½ ounces (or a 30% *increase* per can).

At the same time the orders would empower all Southern canners of oysters to *reduce* the drained or cut out weight of oyster meats for their small Southern oysters from an existing 7½-ounce standard, heretofore found reasonable by the Administrator for the small Southern oysters, to a new requirement of 6½ ounces (or a 13% *reduction* per can).

The avowed purpose of these two orders was to attain "parity" in canned packs of two entirely different species of oysters, produced under different conditions, and purchased by consumers for basically different uses. But, although "parity" was the avowed purpose, the orders compelled *disparity* in name and so-called "parity" in fill was only accomplished by requiring a gross *disparity* in the weight of oyster meat necessarily put into the can by the two different branches of the industry.

Petitioner, after exhausting administrative rem-

---

[2]"Drained weight" is the weight of canned oyster meats remaining in the can after the liquid in which they are immersed in a sealed can and subsequently cooked has been drained away.

edies, sought judicial review, contending that the orders imposed unlawful and discriminatory detriments to petitioner (and other Western canners of oysters) and granted unlawful and preferential benefits to all Southern packers, and were made in violation of the Federal Food, Drug and Cosmetic Act and of the Administrative Procedure Act.

II. SUMMARY OF DECISION OF COURT OF APPEALS

The Court of Appeals held that §401 of the Federal Food, Drug and Cosmetic Act (21 U.S.C.A. §341) limited the power of the Administrator to prescribe, after hearing and upon the record, only "*reasonable*" standards of identity, and "*reasonable*" standards of fill.

It concluded that the "Standard of *Identity*" prescribed by the orders was:

> "extremely *arbitrary, capricious* and *unreasonable* when examined in the light and against the background of the order's entire effect," (R. Vol. XI, p. 31).

and

> "*outside the bounds of reason and fairness* * * * (and) * * * *manifestly unfair* to that portion of the industry discriminated against, and to that extent we regard the requirement as *arbitrary, capricious* and an *abuse of discretion.*" (R. Vol. XI, p. 32).

Accordingly the Court set aside the requirements as to "Standard of Identity" (R. Vol. XI, p. 32). To such extent, Petitioner prevailed, and does not herein seek certiorari.

But the Court concluded that the portion of the orders which prescribed a new "Standard of Fill" was

reasonable, supported by substantial evidence, and lawfully made; and did not violate constitutional rights or procedural due process, or other requirements of law; all as alleged by Petitioner (R. Vol. XI, pp. 8-30). It is this portion of the opinion and decree that petitioner seeks to review by certiorari.

III. JURISDICTION

Jurisdiction to review is specifically conferred on this Court by §701 (f) (4) of the Federal Food, Drug and Cosmetic Act, 21 USCA §371(f) (4). It provides that such judgments of the Court of Appeals are subject to review upon certiorari or certification under §239 and §240 of the Judicial Code, as amended [formerly 28 U.S.C.A., §§346, 347; now Title 28, United States Code (1948) §1254].

IV. QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to find that the "*standard of fill*" portion of the two final orders is not in accordance with law because (a) made without observance of procedure required by law; (b) not supported by substantial and lawful evidence; (c) unreasonable and in excess of statutory jurisdiction; (d) arbitrary, capricious and an abuse of discretion; and (e) contrary to constitutional right.

2. Are the facts in this case "on all fours" with the *second Morgan* case, *Morgan v. United States*, 304 U.S. 1, 22, (1938), in which this Court held that a parallel order was void for want of "fair procedure" because the crucial findings had been prepared for the respondent Secretary's signature:

> "by the active prosecutors for the Government, after an *ex parte* discussion with them and with-

out according any reasonable opportunity to the respondents to know the claims thus presented and to contest them. *This is more than an irregularity in practice; it is a vital defect.*"

3. Is "fair procedure" denied where Petitioner was forbidden to cross-examine and his offer of proof interrupted and rejected by the Presiding Officer even before completed, when Petitioner offered to show that the crucial findings on sharply controverted evidence were prepared *ex parte* for the Administrator's signature by the active prosecutor and witness for respondents.

4. *Does the class of "permissible assistants"* who may assist the Administrator by preparing findings for his signature and who may "resolve conflicts in the evidence" as to which witnesses "should be believed" *include the chief government witness who had testified in direct conflict with testimony of private citizens affected, and the* principal government *attorney who espoused his cause;* or in such case have they so "*buried themselves in one side of the controversy*" that they are necessarily excluded from the class of "permissible assistants" (within the spirit and meaning of this Court's decision in the second *Morgan* case, *supra*) who can render such aid in "*sifting the evidence*" and preparing the findings "*with the dispassionate judgment which Anglo-American tradition demands of officials who decide questions*"?

5. Where a supplemental proceeding has been had pursuant to court remand, is it fatally defective for the Administrator to consider only the first record

(but not the second) and for his Deputy, as Acting Administrator, to consider only the second record (but not the first) when, as the Court of Appeals said, it was necessary that the evidence be:

> "examined in the light and against the background of the order's entire effect" (R. Vol. XI, 31).

6. Or, is such action void for want of "fair procedure" under the rule of this court in the *first Morgan* case, *Morgan v. United States*, 298 U.S. 468, 481 (1936) which held that the "basic rudiments of fair play" are not satisfied when

> "one official * * * examine(s) evidence and another official who has not considered the evidence * * * make(s) the findings and order"?

V. REASONS FOR ALLOWANCE OF WRIT

The reasons relied upon by Petitioner for allowance of a writ of certiorari, and upon which Petitioner believes this petition should be granted are that the opinion and final decree of the Court of Appeals:

1. Decides a federal question involving "fair procedure" and Due Process of Law by an important federal administrative agency in a way that appears to conflict with applicable decisions of this Court, particularly the *first* and *second Morgan* cases, *supra*, and so far departs from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by an administrative agency, as to call for an exercise of this court's power of supervision.

2. Concludes this controversy in a manner that ap-

pears to conflict with a decision of the Court of Appeals for the Third Circuit, and with another decision of the Court of Appeals for the Sixth Circuit, and a third decision of the Court of Appeals for the District of Columbia, and with still a fourth decision of the Court of Appeals for the Fifth Circuit.

3. Raises important questions in the administration of the Federal Food, Drug, and Cosmetic Act, and of the lawfulness of administrative action under the Administrative Procedure Act, which have not been but ought to be settled by this Court.

VI. PRAYER

Wherefore, your petitioner respectfully prays that this petition be granted and that a Writ of Certiorari be issued directed to the United States Court of Appeals for the Ninth Circuit.

Dated at Seattle, Washington, August 17, 1949.

Respectfully submitted,

ALBERT E. STEPHAN,
Counsel for Petitioner, Willapoint Oysters, Inc.

GROSSCUP, AMBLER & STEPHAN,
711 Central Building,
Seattle 4, Washington,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. OPINIONS BELOW

The First Final Order of the Administrator, dated March 10, 1948, is reported in the Federal Register, March 13, 1948, 13 F.R. 1337-9 (R. Vol. II, pp. 40-45c).

The Second Final Order of the Acting Administrator, dated August 3, 1948, is reported in the Federal Register, August 12, 1948, 13 F.R. 4653-4 (R. Vol. IX, pp. 1-7).[3]

The "slip" opinion and decree of the Court of Appeals dated April 29, 1949, constitutes Volume XI of the Record. The opinion is reported in 174 F.(2d) 676 (adv. sh.).[4]

II. STATUTES INVOLVED

The statutes involved are the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, c. 576; 21 U.S.C.A. §301, *et seq.*; and the Administrative Procedure Act, 60 Stat. 243, c. 324; 5 U.S.C.A. (Supp.) §1001, *et seq.* Pertinent portions are set forth in *Appendix A* hereof.

III. SUMMARY STATEMENT

The ultimate question presented is the requirement of fair procedure by administrative agencies.

---

[3]The two final orders are also annexed as *Appendices A* and *B* and to the First Supplemental Petition for Judicial Review filed herein (R. Vol. X, pp. 50, 59).

---

[4]Also unofficially reported, C.C.H. Food, Drug and Cosmetic Law Reports ¶7119.

Nothing contained in this case attacks the *personal* integrity of the government officials involved, but Petitioner does vigorously challenge the *official* integrity and basic fairness of Respondents' method of deciding controverted matters.

Nor is this a case which fruitlessly raises the "substantial evidence" question. But it does vigorously challenge the conclusion that by denominating a proceeding as "rule-making" it is virtually immunized against attack. Petitioner respectfully submits that the opinion of the Court of Appeals sustaining these practices is not in accordance with prior decisions of this Court.

May the three-fold combination of Judge, Jury and Prosecutor become *indeed* a four-fold one to permit the witness, if a government officer, to be prosecutor and then to testify and then to cross-examine opposing witnesses and finally be Judge and Jury as to the weight and credibility of his own testimony?

May he reach conclusions, theoretical or otherwise: then give evidence in support of his pre-formed conclusions; then sit in judgment of the validity of such testimony when set opposite that of private citizens affected; and finally "sift the evidence" and prepare the findings for the Administrator's signature, when in so doing he "sifts in" his own evidence and "sifts out" that of his opponents? Does this satisfy all that this Court requires of the "substantial evidence" rule and of "fair play"?

These questions are not conjecture but are well recognized reality.

Mr. H. Thomas Austern, an eminent lawyer, specializing in Food and Drug matters, and the General Counsel of National Canners Association, points out in a scholarly article on the subject,[5] the deficiency of fairness in Respondents' procedural methods of prescribing mandatory food standards. He states:

> "* * * those who are *parties* to a controversy ultimately *participate in* its *decision and* in the *preparation of* the *findings on which* in large measure *judicial review will turn.*
>
> "* * * *the findings* proposed and ultimately made in a few standard proceedings *are unduly provocative.* In some respects *they invite discussion and warrant suggestions for improvement.*
>
> * * * * * * * * *
>
> "In the first place, *there is a tendency to write up the evidence to support* the decision *and* to *write down or disregard the evidence the other way.* * * * *This may be a form of advocacy, but it is hardly adequate findings as to the facts of record.*
>
> "* * * *Where findings* on a controversial issue *consistently* dispose of numerous industry witnesses by reciting merely that 'there is some evidence' and *invariably* sum up a government witness' testimony by a categorical statement of the fact to which he testified, *it is difficult to convince critics that the record is being evaluated without bias.*"

---

[5]Austern, The Formulation of Mandatory Food Standards, 2 Food, Drug and Cosmetic Law Quarterly, 532 at 579-581 (1947).

Similarly, Mr. James M. Best, another skilled counsel in Food and Drug matters and the General Counsel of the Quaker Oats Company reaches similar conclusions.[6]

> "* * * restraint may well * * * be exercised to insure that the public hearing is conducted in such a manner as to eliminate any suspicion of unfairness. This is particularly necessary because the statutory procedure for standard-making itself possesses the indicia of unfairness. The standard is *proposed* by Departmental officials, *presented* by a Departmental attorney, *supported* by testimony of Departmental officials, and *submitted* to a Departmental hearing officer who reports his findings and conclusions back to the Departmental officials who proposed it. *The manufacturer would be naive indeed who would not have some misgivings about the effectiveness of this procedure to prevent arbitrary action.*"

If the elaborate Congressional requirements for hearings based on evidence be thus thwarted, the statute becomes a mockery and all the Administration's witness need do is plan his conclusions, patiently sit through a *pro forma* hearing, offer his own evidence in support, await a ritualistic tender by industry witnesses of opposing evidence, then prepare findings as he had originally conceived. For under the evolution of the limits on judicial review, a Court may not review the Record for the purpose of reaching different conclusions. "The judicial function is exhausted when there is found to be a rational basis for

---

[6]Practical Aspects of Cereal Food Standardization, 3 Food, Drug and Cosmetic Law Quarterly, 204, 212-214. (1948)

the conclusions approved by the administrative body." *Rochester Telephone Corporation v. United States*, 307 U.S. 125, 146 (1939).

But this Court, recognizing that rule, has expressly held that the basic rudiments of fair play must also be observed. Respondents' practice challenged here violates every concept of Anglo-American fairness. *Ohio Bell Tel. Co. v. Comm.*, 301 U.S. 292, 294-5 (1937); *Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229-30 (1938); *Morgan v. United States*, 298 U.S. 468, 481 (1936); *Morgan v. United States*, 304 U.S. 1 (1938).

IV. SPECIFICATION OF ERRORS TO BE URGED

Petitioner respectfully submits that the Court of Appeals erred:

In failing to find that the "*standard of fill*" portion of the two final orders is not in accordance with law because (a) made without observance of procedure required by law; (b) not supported by substantial and lawful evidence; (c) unreasonable and in excess of statutory jurisdiction; (d) arbitrary, capricious and an abuse of discretion; and (e) contrary to constitutional right.

V. STATEMENT OF THE CASE

The legal questions presented require a more detailed factual statement that is normally indicated in petitions for certiorari.

(a) Two entirely different species of oysters are canned.

Two entirely different species of oysters are commercially grown and canned (R. Vol. III, 33). As a

"shorthand" method, they are frequently termed "Southern" and "Western" oysters, respectively.[7] The biological differences in the two species go back a million years (R. Vol. III, 161-2). Both types have been cultivated and processed as "canned oysters" for many years in two different regions of this country (R. Vol. III, 156-8).

The Southern species of oysters, known biologically as *ostrea virginica*, now flourish on the Gulf Coast of the Southern states, particularly in Mississippi and Louisiana (R. Vol. III, 128-30). They are very small, fibrous and hard tissued. When canned, they are known as "canned oysters," and also variously termed locally as "Cove", "Gulf Coast", "Eastern", "Atlantic", and "Southern" oysters (R. Vol. IV, Ex. 5, pp. 1-45).

The Western species of oysters, known biologically as *ostrea gigas*, is (as its Latin name implies) of "giant" size, soft and loose-tissued. Originally grown on the Japanese Coast, they are now indigenous to the cold waters of the Pacific Northwest in Washington and Oregon (R. Vol. III, 157-8). When canned they also are known as "canned oysters" and variously termed locally as "Pacific Coast," "Japanese," "Tillamook" and "Western" oysters (R. Vol. III, 179, Vol. IV, 634, Ex. 5, pp. 1-45).

Both species are canned in various sizes of tins, of which the typical or standard size is the No. 1 can,

---

[7]Neither species should be confused with fresh raw oysters familiar on the East Coast and commonly known as Blue Points, Lynnhavens, Long Islands and Chincoteagues (R. Vol. XI, 32).

having a water capacity of 10.94 ounces. It is identical in size and shape to the familiar "Campbell Soup" can. For many years, this size has been filled with canned oysters of *either* species to a drained weight of 5 ounces (R. Vol. III, 63-4).

The differing nature and size of the two different species of canned oysters is illustrated by the fact that a standard size can packed to yield the drained weight of 5 ounces of Southern oysters contains from 20 to 65 of the small Southern oysters; but the same can identically packed to yield the same 5-ounce drained weight of Western oysters contains only 4 to 8 of the giant Western oysters (R. Vol. IV, Ex. 3, Findings 12 and 13).

These comparisons are important in subsequent consideration of the extent to which additional quantities of these two different species of oysters may be placed into cans without resultant damage to their natural qualities in appearance, color, texture and shape.

(b) History of standard of fill.

In 1914, following "extended investigation", respondents' predecessor, the Department of Agriculture, promulgated an "advisory standard" fixing a "*drained weight*" of *5 ounces* of oysters in the No. 1 can.[8] This standard was reconsidered over the years

[8]Substantially identical proportions, averaging from 42 to 49 per cent of the estimated water capacity of the respective cans were required for other sizes (R. Vol. IV, Ex. 3, Findings 2 and 3).

on several occasions[9] and remained effective under Food and Drug regulations until 1944 as to Southern oysters and until the present 1948 orders as to Western oysters (R. Vol. IV, Exs. 3, 4).

In 1942, because of the war tin shortage, Southern packers who were canning both Southern oysters and shrimp voluntarily increased the drained weight of their packs of both the small Southern species of oysters and Southern shrimp from 5 ounces to 7½ ounces (R. Vol. IV, 550, 554-5) and the War Production Board, under emergency War Power regulations, and without formal hearing or findings, issued its Conservation Order No. M-81, which in effect made such increases mandatory (R. Vol. IV, 448). This 1942 Conservation Order limited the availability of tin plate and cans to certain minima requirements in many industries, including one which restricted the availability of tin for *all* species of canned oysters to packers of a drained weight fill of 7½ ounces.[10]

Compliance by Western packers of oysters would have meant a destructive fill of their larger Western oysters. Western canners did not overpack, and accordingly during the war years could not qualify to obtain tin cans. They temporarily ceased production of canned oysters, and sold only fresh oysters while Conservation Order No. M-81 was effective. This order expired after the end of the war (R. Vol. III, 204, 443).

---

[9]Dunn, Food and Drug Laws (First ed. 1927, 3 vol.), Vol. 1, pp. 21-2, 39-40, 46, 103-4, 201.

[10]7 F.R. 947, 4836 and successive amendments. See 32 C.F.R. (Cum. Supp.) 9318.

Meanwhile, in 1944, two years after Conservation Order No. M-81 had become effective, the Food and Drug Administration held a hearing to establish a standard of fill under Food and Drug Laws.

The Western industry attended this 1944 hearing and protested applicability of a proposed 7½ ounce fill to its large oysters (R. Vol. III, 66). The Southern industry neither attended the hearing nor protested the fill for their small oysters (R. Vol. III, 450-1, 545). A witness for the Administrator testified in favor of such a 7½ ounce fill for small Southern oysters (R. Vol. III, 15). On the basis of his testimony, the Administrator issued in 1944 an order under §401 of the Federal Food, Drug and Cosmetic Act, which established the 7½ ounce fill as a "reasonable" standard of fill for the small *Southern* oysters only. It expressly excluded large Western oysters from its requirements (R. Vol. IV, Ex. 3, Finding 12, Conclusion 1).

Thus, in 1947, after Order M-81 had expired, the 7½ ounce drained weight was applicable for small Southern oysters, and the 5 ounce drained weight again applicable for large western oysters.

(c) Biological and processing differences in two species shown at 1947 hearing.

In July, 1947, the Administrator held a new hearing on a proposal to fix new standards for *all* species of canned oysters (R. Vols. III and IV).

The evidence showed a great dissimilarity in the biological nature and in the opening, processing, and

packing of Southern and of Western canned oysters[11] (R. Vol. IV, Ex. 3).

The small Southern oyster has a heavy shell. Prior to canning, it is subjected to intense pre-steaming to open its shell. This causes these little oysters to shrivel and dehydrate and to lose their natural body moisture, with the result that when subsequently placed in the can, immersed in a hot salt water packing solution and sealed, they "pick up" or re-absorb from ¼ to ½ ounce of the salt water and hence increase in "drained weight" while in the sealed can (R. Vol. IV, 561, Ex. 3, Findings 7-9).

But the large Western oyster has a light, thin shell. They are either opened "raw" by hand or are subjected to a very light steaming process to open their thin shells. When placed into the can, and sealed, Western oysters still retain much of their natural body fluids, which perserve their natural fresh color and appearance and their natural size and shape. But after the can is sealed and while it is subjected to a final sterilization heat, these Western oysters "bleed" or exude a portion of these body fluids into the salt water packing solution. This converts the packing medium from mere salt water into a very palatable and healthful true oyster nectar (R. Vol. III, 182-5). But it also results in a substantial decrease of from 2 to 2½ ounces in the final "drained weight" of Western oysters [R. Vol. IV, Ex. 15(a)].

---

[11]The only similarity is that in the final stage of canning both species, they are placed into cans in a packing medium consisting of a hot salt water solution, which cans are then sealed and cooked in a final sterilization heat.

Thus, for any identical "drained weight" fill (of which the 5 ounce fill is illustrative) *the Southern industry "puts in"* approximately 4¾ *ounces* of its small oyster meat, which gains in the can ¼ ounce because of absorption, *to yield the 5 ounce* "drained weight". *The Western industry "puts in"* to the same size of can approximately 7½ *ounces* of its large oyster meats, or more than 50% more oyster meat, but "loses" in the can approximately 2½ ounces because of exudation into the packing medium, *to yield the same 5 ounce* "drained weight."

(d) Required increase in Western fill and decrease in Southern fill.

The First Final Order found the "interest of consumers" would be advanced by reducing the 7½ ounce fill previously found reasonable for Southern oysters to 6½ ounces, and by increasing the 5 ounce fill previously applicable to Western oysters to 6½ ounces (R. Vol. II, 40, 45, Conclusions).

(e) Lack of substantial evidence to support order.

Respondents offered no evidence in support of their proposal to add more water and less oysters to Southern packs, and *vice versa* for Western packs, but relied entirely on *a priori* testimony and conclusions that identical 6½ ounce "drained weight" fills were in the interest of consumers because it improved the economic competitive status of the two industries, regardless of differences in species, processing, and consumer preference for a natural tasting and appearing canned product.

Testimony as to the significance of certain experi-

mental packs made on behalf of respondents and of the industry, respectively, was *sharply conflicting* between witnesses for the Administrator and those for industry (*e. g.*, R. Vol. IV, 636, 657-701).

(f) Industry's quality deterioration evidence ignored.

Petitioner (and other Western packers) testified that the increased pack would destroy the quality of the product and offered elaborate supporting scientific and industrial evidence showing that such an excessive increase in the required drained weight would cram the can, with resultant discoloration, disfiguration, distortion and breakage of oysters, and thereby would destroy the large consumer acceptance of petitioner's product which has been packed and marketed at a uniform standard of fill for more than twenty years as a "quality pack", *i. e.*, one that resembles the natural fresh oyster as closely as possible in color, appearance and taste (R. Vol. III, 170, 185, 200, 214-270; 564-5).

(g) Evidence of "browning" and other quality impairment disregarded.

The Western industry showed by detailed scientific evidence of accredited zoology experts and other qualified scientists that overpacking of large Western oysters beyond the historic 5-ounce fill causes a "browning" or oxidation of exposed surfaces of the oyster which, when overpacked, are forced to protrude above the level of the packing medium nectar within the sealed can of Western oysters. (R. Vol. III, 237, 324-5, 527 537; Vol. IV, 610-14).

This "browning" ranges from a faint yellow tinge

to a heavy brown stain, approximately the color of a package of Philip Morris cigarettes (R. Vol. III, 353).

Browning is not a spoilage, but the average housewife erroneously so concludes, and thereafter rejects the brand that has such discoloration (R. Vol. III, 527).

Overpacking also causes other disfiguration in the form of pressure blemishes, distortion, twisting and breakage (R. Vol. III, 331, 515; Vol. IV, Exs. 14-18).

Modern canning methods are used, and these detriments resulting from overpacking cannot be avoided by improved manufacturing process (R. Vol. III, 236-7, 322).

(h) Southern industry did not challenge Western evidence.

The Southern industry *did not dispute* the Western evidence. In the main the Southern industry confined its plea to an economic one for a uniform quantity of fill, whatever percentage might be fixed, and urged that both branches of the industry return to the historic 5-ounce fill (R. Vol. III, 447, 455).

(i) Sole opposing evidence came from Administrator's witnesses.

The opposing evidence came entirely from the Administrator's witnesses, chiefly from his "investigative and enforcement" officer who contended sometimes by testimony, sometimes by cross-examination, and sometimes by elaborate statements that are impossible to classify (as whether sworn *testimony* in his "witness" capacity, or his unsworn *observations* in his "advocate" capacity) that quality deterioration was

not important; that "browning" was not a significant detriment; that it could be avoided by "*good manufacturing*" processes; and that the Western industry exaggerated the effect of discoloration, distortion and disfigurement (R. Vol. III, 13-91, 368, 374, 383-6, 392-5, 566-602). He ignored substantial consumer preference for the natural flavor that results only by retaining the natural moisture, and subsequently denied the parallel found in the taste differences between canned fresh peas and dried or dehydrated peas which yield two entirely different tasting foods (R. Vol. VI, 980). He ignored evidence which showed that resultant packs of canned oysters when prepared for eating by blanching or light pre-steaming are entirely different and enjoy definite consumer preference over the dehydrated product (R. Vol. III, 554).

(j) Interest of consumers ignored.

No evidence of any kind was offered by respondents as to "interest of consumers" except the Administrator's theory that regardless of appearance or taste, the consumer's interest is better served if all cans have identical drained weight (R. Vol. III, 40). No consumers testified.

(k) Presiding Officer stripped of power to determine credibility of witnesses.

The matter was heard before a Presiding Officer, who, under the terms of his appointment, was authorized only to hear and receive the evidence. He was expressly stripped of any power to weigh or evaluate the *sharply conflicting evidence*, but was directed to:

"Certify the entire record of the proceedings to the Administrator for the *initial* decision." (Vol. II, 1).

(l) The making of the first final order.

Thereafter, the Administrator published a proposed report. Exceptions filed were generally overruled. Petitions for further hearings and reconsideration were filed and denied in their entirety (R. Vol. II, 45-51).

The First Final Order was then issued. It required the 6½ ounce "drained weight" for both Western and Southern oysters and further required that Western oysters be specifically designated in their label as *"Pacific Oysters"*, while authorizing the Southern species of oysters to enjoy thereafter an exclusive use of the long established name *"Oysters"* previously used by both branches of the industry.

(m) Court of Appeals remand of proceeding to Administrator.

After all administrative remedies had been exhausted, petitioner sought judicial review. It showed by pleadings and oral argument the substance of the foregoing; and further showed that during the interim following the first hearing it had developed a new blanching process, which greatly improved the natural qualities of canned oysters, and that the Administrator had refused its request for a further hearing or oral argument to establish the impossibility of complying with these requirements without totally destroying the quality of the product (R. Vol. I, 1-21).

The Court of Appeals determined that prior to considering the entire case on its merits it would direct the Administrator on remand to take additional evidence relating to the new blanching process (R. Vol. V, 40-42).

(n) Improved blanching method of preparing canned oysters shown at second hearing, and quality deterioration that results from excessive pack.

At the second hearing on remand, petitioner showed by further scientific evidence the resultant "browning" and other quality deterioration in such an overpack of the blanched larger Western oysters and the impossibility of avoiding it under the required excessive fill (R. Vol. VII, 713-797; Exs. 25, 26, 27).

It also showed the report of an objective and unbiased consumer food panel, in which petitioner's improved fresh opened and blanched canned oysters were selected as best in quality, appearance and taste (R. Vol. VII, Ex. 28).

(o) Only opposing evidence again came from Administrator's witnesses.

Again, the Southern industry *did not dispute* this evidence, but confined its plea to one for uniform quantity requirements, urging a return for both branches of the industry to the pre-war standard (R. Vol. VII, 1035-48, Ex. 34).

Again, the chief *opposition* came from *sharply conflicting evidence* by the Administrator's "investigative and enforcement" officer who testified, and from his attorney, who cross-examined industry witnesses to

try to support their theory that resultant "browning" and other quality deterioration, as testified to by petitioner, were exaggerated and overstated and could be avoided by good manufacture (R. Vol. VI, 797-835, 882-981).

(p) Presiding Officer again stripped of power to determine credibility of witnesses.

The same examiner presided again. He was again stripped of power to determine the credibility of witnesses or probity of the evidence, but directed to "certify the record to the Administrator" for "decision" (R. Vol. VI, 703).

(q) Administrator's "investigation and enforcement" officer, as witness, and his prosecuting attorney, prepare "findings" based on *ex parte* weighing of their own evidence.

During the course of the second hearing, present counsel for petitioner (who had not theretofore represented Petitioner at the original hearing), was informed that the "findings of fact" underlying the challenged First Final Order, although promulgated under the name of the Administrator had actually been prepared, not by the Examiner who heard the case, nor by the Administrator to whom the record was "certified", and by whom it was signed, but on the contrary was prepared for his signature by the very "investigative and enforcement" witness and his attorney who had opposed all evidence offered by petitioner and other industry witnesses, and who had testified and cross-examined in aid of such opposition.

(r) Presiding Officer's refusal to permit either cross-examination or offer of proof to show this absence of "fair procedure."

Because of the elusive nature of "browning"[12] and the *sharply conflicting testimony* between industry witnesses and this witness for the Administrator as to the causes of browning and as to whether it could be eliminated by good manufacturing processes (R. Vol. VI, 913-5), it became important that whoever was the "fact finder" should be able to evaluate this conflicting evidence objectively and without bias, either intentional or of the unintentional nature, which is elementary in the ancient rule that:

"No man shall be judge in his own cause."

Therefore, Petitioner on cross-examination sought to confirm his information that it was this very witness and his attorney who had prepared and written the "findings of fact" in the First Final Order (R. Vol. VI, 960), including so much of paragraph 6 thereof as relates to "browning" (R. Vol. VI, 961); and the sentences which state that:

> "Browning is a type of discoloration occurring in oysters protruding above the packing medium,"

and which purport to find that:

---

[12]The Presiding Officer injected into Petitioner's cross-examination as to use of the terms "slight browning", "medium browning", and "heavy browning", his observation:

> "I think the administrator can take official notice, and any court can take *judicial notice* that *this term* which we are now discussing extensively, and I might add, needlessly, *has no standard, no standard of specificity.*" (R. Vol. VII, 913).

"It is related to the amount of entrapped air in the can at the time of closure." (Ibid, p. 962), and that:

"Excessive entrapped air can be avoided in good manufacturing process." (R. Vol. VII, p. 985, 991-2)

Every effort of petitioner on cross-examination to make such inquiries was blocked by the Presiding Officer, sometimes on his own motion and in the absence of any objection, and sometimes on objection of respondents' attorney.

Thereupon, counsel for petitioner began an offer of proof that:

"* * * in violation of my understanding of the Administrative Procedure Act, §5(c), the order in issue of March 10, 1948, violates so much of that section as provides that 'save to the extent required for the disposition of ex-parte matters as authorized by law, no such officer (referring to the officers who presided at the hearings) shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor shall such officer * * *' ." (R. Vol. VII, 993)

But before Petitioner could even conclude its offer of proof to show violation of the Administrative Procedure Act and of procedural due process, the Presiding Officer interrupted, and refused to permit Petitioner to complete the offer of proof, and directed counsel to proceed with permissible cross-examination (R. Vol. VII, 994), contending that the offer of proof was:

"* * *entirely irrelevant to these proceedings,

> because what you are referring to, sir, relates exclusively to quasi-judicial matters; this rule making is quasi-legislative, and I do not think you are gaining anything by any extended discussion of §5 or any part of it."

Many other irregularities believed fatal to the validity of the two orders were alleged. Most of them are considered in the opinion of the Court of Appeals; and are summarized in the Petition for Rehearing (R. Vol. XII, 1-53), to which this Court's attention is respectfully invited.

VI. ARGUMENT

(a) The agency's procedure, approved by the lower court, calls for an exercise of this court's power of supervision. If sanctioned it would nullify requirements of "fair play" and permit the responsible fact-finder to rubberstamp work prepared ex parte by one of the adversary witnesses.

It is repeated for emphasis that petitioner does not challenge the *personal* integrity of the government officials but does challenge the *official* integrity of a procedure which permits a government witness first to testify and then to appraise the credibility of his own evidence.

The rule "No man shall be a judge in his own cause" finds universal application in judicial and administrative procedure. An early Washington case states it well. In *Maitland v. Zanga*, 14 Wash. 92, 95, 44 P. 117 (1896), the court held:

> "* * * if this practice were to be tolerated, that the judge * * * would be compelled to pass upon the weight of his own testimony, * * *

> *considering the inclination of the human mind to attach more importance to its own statements than to those of others,* it is easy to see that *the rights* of the *litigants might be prejudiced* in such a case."

This court has stated it even better and has squarely applied the principle to administrative proceedings in the *Second Morgan* case, *supra*, 304 U.S. at 19-20:

> "* * * *If in an equity cause,* a special master or *the judge permitted the plaintiff's attorney to formulate the findings* upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and *then adopted his proposals* without affording an opportunity to his opponent to know their contents and present objections, *there would be no hesitation in setting aside the report or decree* as having been made without a fair hearing. The *requirements of fairness are not exhausted in the taking or consideration of evidence* but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

That case involved "rule-making" for cattle. Is there any legal difference between a "rule-making" order which prescribed *ratios* of *fill* for canned *oysters* required *to be observed in the future,* and a "rule-making" order which prescribed *rates* of *brokerage* for shipped *cattle* required *to be observed in the future* insofar as "fair procedure," "fundamental requirements of fairness," and "basic concepts of fair play" are concerned?

The Court of Appeals ignored this case and this principle, though strongly relied on by petitioner in

brief and in argument. That court said that in "rule-making":

> "there is no constitutional right to any hearing whatsoever." (R. Vol. XI, 26)

It is respectfully submitted the Court of Appeals was in error in founding its opinion upon so broad a statement.

First: The orders are void because they do violate constitutional rights of petitioner to a fair hearing. When Congress by express legislation requires a hearing and that findings of fact be based solely on the evidence of record, *constitutional* safeguards of procedural due process are required as well as *statutory* provisions.. *Morgan v. United States*, 298 U.S. 468, 481-2 (1936).

Once a hearing has been required by statute, it necessarily requires a fair and full hearing. *Carter v. Kubler*, 320 U.S. 243, 247 (1943); *Chicago Junction Case*, 264 U.S. 258, 264-5 (1924); *Mahler v. Eby*, 264 U.S. 32, 44 (1924).

The inexorable safeguard which the due process clause assures is that the trier of the facts shall be an impartial tribunal. *Morgan v. United States*, 304 U.S. 1, 22 (1938).

Second: The orders are void under the Administrative Procedure Act. It provides that:

> "Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. * * *"

This Act therefore in no way restricts the scope

of this court's requirements of judicial due process. The question is whether the Administrative Procedure Act *also* forbids such unfair procedure, particularly §5(c), set forth in Appendix A, hereof, ~~P. 8.~~ *pp. 6-7*

In the Attorney General's Manual on the Administrative Procedure Act (1947) he states at page 13 that the definitions of "rule" and "rule-making" and of "order" and "adjudication"

> "leave many questions as to whether particular proceedings are *rule-making* or *adjudication*,"

and that:

> "Typically, *the issues* (*in rule-making*) *relate not to* the *evidentiary facts*, as to which the *veracity* and demeanor *of witnesses* would often be important, *but* rather *to* the *policy-making conclusions* to be drawn from the facts." (p. 14)

This case is not such typical "rule-making." It does relate specifically to the *veracity* and *credibility* of witnesses.

In drafting the Act, much reliance was placed upon the Final Report of the Attorney General's Committee (1941), (Sen.Doc. 8, 77th Congress, 1st Sess.). In discussing rule-making that report stated, at pages 108-110:

> "Hearings in rule-making are usually * * * investigatory * * *. The purpose is not to try a case * * *.
>
> "Rule-making proceedings do occur, however, in which an adverse element is present. It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. * * * *Under these circumstances it may be desirable to* let affected parties *treat the rule-*

making proceedings as adversary, so that all the information, conclusions, and arguments submitted to the agency may be *publicly* disclosed to opposing interests which may answer, explain, or rebut. * * *

"*Hearings of this type may be held* * * * *because of statutory requirements, as in the case of the Food and Drug Administration* * * *."

Again, at page 56, the Committee Report stated:

"*Two characteristic tasks of a prosecutor are those of investigation and advocacy. It it clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision.* * * * Of course, *this may produce a state of mind incompatible with* the objective *impartiality* which must be brought to bear in the process of deciding. *For this same reason*, the advocate—*the agency's attorney* who upheld a definite position adverse to the private parties at the hearing —*cannot be permitted to participate* after the hearing *in* the making of *the decision.* **A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.** *Clearly the advocate's view ought to be presented publicly and not privately to those who decide.*"

The author of the bill, Senator McCarran, in reporting the bill to the Senate, said:

"The exemption of rule making and determining applications for licenses, from provisions of section(s) * * *, 5(c), * * * may require change if, in practice, it develops that they are too

> broad. The committee believes it has followed sound discretion in selection of the language used, and *it is the feeling of the committee that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions.*"[13]

Clearly, as stated by this court in the *first Morgan* case, 298 U.S. 468, 481-2, the rule that the officer who makes the determination must consider and appraise the evidence:

> "does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. *Assistants* may prosecute inquiries. Evidence may be taken by an *examiner*. Evidence thus taken may be sifted and analyzed by competent *subordinates*."

But from this contention respondents in their brief argue, and the Court of Appeals sustained them, that because the proceeding is denominated "rule making," there is no statutory or constitutional prohibition against the *adverse witness* subsequently being the "*competent subordinate*" who prepares the findings of fact, including a power to act for him in resolving

> "any conflicts in the evidence and to decide whether the testimony of witnesses who appeared in the hearing should be believed."[14]

The present question is whether such a practice accords with the intent of Congress. The very first words of the Administrative Procedure Act describe it as:

---

[13]Administrative Procedure Act, Legislative History, 79th Cong., S. Doc. 248, pp. 324-5.

[14]Respondents' brief before Court of Appeals, page 33.

> "AN ACT to improve the administration of justice by prescribing *fair* administrative procedure."

The legislative history abounds with an intent to fulfill such a purpose. To strain the "dichotomy" to the extent sought by respondents and sustained by the Court of Appeals would over-emphasize the words "rule making" at the expense of "fair procedure" in adversary proceedings. It is the substance of what the agency has purported to do which is decisive. *Columbia System v. United States*, 316 U.S. 407, 417 (1942).

> "Overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect."
>
> *Powell v. United States*, 300 U.S. 276, 285 (1937).

As stated in *United States v. Abilene & So. Ry.*, 265 U.S. 274, 289 (1924):

> "Every proceeding is adversary, in substance, if it may result in an order in favor of one * * * as against another."

The order is void under a proper interpretation of the terms of the Administrative Procedure act because in violation of its provisions and intent, investigative and enforcement officers participated in the preparation of the decision of an adversary proceeding and were not limited to their lawful capacity as witness and as counsel, respectively, in public proceedings.

Third: The order is void under the Federal Food, Drug and Cosmetic Act. The terms of the requirements of that Act are clear that orders shall be based

on findings of fact and evidence made in a public record, §701(e). The Congressional intent to preserve constitutional precepts of fair procedure is likewise clear, §701(f); Appendix A, hereof, pp. 1, 2.

To exempt the proceedings from standards of judicial due process and fair procedure is contrary to Congressional intent. Chairman Lea of the House Committee reporting the Act stated that §701(e) was drafted:

> "before the Supreme Court made its famous decision in the (second) *Morgan* case (304 U.S. 1), but it, in substance, provides that the legislative agency shall do the very things that the Supreme Court said they should do in the *Morgan* case." 83 Cong. Rec. 9096 (1938)

If the Food and Drug Administration's own employees may prepare proposed standards, testify as experts, and thereafter participate in drafting of regulations, then judicial review can avail little.

But judicial review was intended to avail much. Referring to judicial review, the Chairman stated:

> "* * * We give more authority * * * under this bill than any white man ought to have unless with it there is proper restraint by the courts. That is what we have tried to do here." 83 Cong. Rec. 7776 (1938)

This court's rule of fair procedure in the first and second *Morgan* cases was referred to and identified specifically by name no less than five times by Chairman Lea during the course of his statement of the

Committee's intent. 83 Cong. Rec. 7775, 7776, 9098, 9099,[15]

It is respectfully urged that the legislative history of the Federal Food, Drug and Cosmetic Act made it abundantly clear that Congress intended the specific standards heretofore considered in these two *Morgan cases*, to measure "fair procedure" under that Act, and that so measured, the present orders are void and must be set aside, or remanded for further proceedings not inconsistent therewith.

(b) The decision of the Court of Appeals is in conflict with other decisions of other Courts of Appeal.

Assuming, *arguendo*, that it is violative of constitutional and statutory principles for the witness who took one side of the controversy to be permitted thereafter *ex-parte* to prepare, for the Administrator's signature, findings, which "sift-in" that witness's testimony and "sift out" the conflicting evidence, then the refusal to permit cross-examination to develop these

---

[15]The entire legislative history is conveniently reprinted and quoted in full text from pertinent volumes of the Congressional Record, and relevant House and Senate Committee Hearings and Reports in one bound volume, *Dunn, Food, Drug and Cosmetic Act* (G. E. Stechert & Co., New York, 1938), and the accompanying separately bound *Dunn, Index to Federal Food, Drug and Cosmetic Act* (G. E. Stechert & Co., 1940).

The *second Morgan* case was decided by the Supreme Court *April 25, 1938*, re-hearing denied *May 31, 1938* (304 U.S. 1, 23).

The statements were made by Chairman Lea on the floor of the House *after* that decision, during the period from May 31 to June 15, 1938. (*Dunn*, 840, 924, 969, 996-7, 1010, 1012, 1015).

facts, and the interruption and refusal to even permit completion of such an offer of proof, is a fatal defect.

The Court of Appeals held that:

> "To exclude an offer of proof is a dangerous and imperfect practice." (R. Vol. XI, 22)

But the court stopped short there, and did not invalidate the order for such failure. This is in conflict with a decision of the Sixth Circuit. In *Powhatan Mining Co. v. Ickes*, 118 F.(2d) 105, 110 (C.C.A. 6, 1941) that court held a similar order void, stating:

> "* * * One who has been denied access to information or deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. Likewise, a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling."

There also appears to be conflict with the Court of Appeals for the Third Circuit as to want of judicial due process. In *Berkshire Employees Association v. National Labor Relations Board*, 121 F.(2d) 235 (C. C.A. 3, 1941), the court held an order made under similar circumstances void, stating, p. 23:

> "* * * It is comparable to the situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim and, before the claim is settled, is appointed to the bench and sits in the very case as judge. * * * We conclude that in this case the facts, if proved, show a case which goes beyond the line of fair dealing with a particular litigant."

The decision also appears to be at variance with a

very recent decision of the Court of Appeals of the District of Columbia in *Dorsey v. Kingsland*, 173 F. (2d) 405, 410 (1949); certiorari granted April 15, 1949. No. 729 (Oct. Term, 1948) *Kingsland v. Dorsey*, ...U.S. .....; 69 S.Ct. 1160 (Adv.sh.). In that case the Court of Appeals held:

> "* * * in 1922, the doctrine of *'administrative finality' (or administrative infallibility) had never been heard of. But by 1936 this theory was thoroughly familiar* to lawyers and *Congress proceded to legislate upon it*, among other things, *by passing the Administrative Procedure Act* * * *. Under Section 10(e) of* * * * (that) *Act, it became the right and indeed the duty of the court* * * * *to* judicially review the action of any agency, and it may *review the whole record* * * * *for the purpose of ascertaining any prejudicial error. Under these provisions the burden of proof must be upon the proponent of the rule to show cause.*
>
> "The whole legislative history of the Administrative Procedure Act and more particularly *the luminous discussion on the floor of the Senate between three of the leading lawyers of the Senate, Senators George, McCarran and Ferguson conclusively show that it was the inflexible intention of Congress to* * * * *'establish a guide for administrative groups* so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and *so that they could say, "We are not afraid to have our findings reviewed by a court."* * * *'
>
> * * * * * * * * * * *
>
> "* * * *the trial court by the extremely narrow view of its own jurisdiction, limiting it in effect to the 'administrative finality' and 'abuse of*

discretion' doctrines, has denied the appellant *the protection of the statutes mentioned and in effect permitted him to be deprived of a valuable right without due process."*

(c) The decision of the Court of Appeals presents important matters in the administration of the Federal Food, Drug and Cosmetic Act and in the interpretation of the Administrative Procedure Act which have not been, but should be, determined by the court.

Only one case has reached this court concerning the power of the Administrator to prescribe mandatory food standards under §401 of the Federal Food, Drug and Cosmetic Act. *Security Administrator v. Quaker Oats Company*, 318 U.S. 218 (1943). That case turned on fundamental principles of the "substantial evidence" rule with which petitioner does not take issue as a matter of law.

The present case challenges the fairness by which the Administrator, through his signature, endorsed the wholly partisan opinions first given under oath as evidence, then "sifted in" by the same witness as "findings of fact." This is utterly violative of due process. Other legal deficiencies, including want of substantial evidence, spring from such denial.

A decision on the scope of protection afforded by the Administrative Procedure Act is of great importance to all administrative agencies, litigants appearing before them and Appellate Courts. This case presents inescapably by pleadings, record and brief the issue of basic fairness. In a scholarly opinion by Circuit Judge Hutcheson, *National Labor Relations Board v. Phelps*, 136 F.(2d) 562, 563-4 (C.C.A. 5, 1943), that Court

relied upon many prior decisions of this court, including the *first* and *second Morgan* cases, and held:

> "* * * *Nor will the fact that an examination of the record shows that there was evidence which would support the judgment,* at all *save a trial from the charge of unfairness,* for *when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.*"

If there be no constitutional and statutory prohibition against the adverse government witness subsequently preparing *ex parte* the findings, which "invariably" *write up* the government evidence and "consistently" *write down* the private citizen's evidence,[16] then the elaborate statutory requirements for hearings based on evidence are set at naught, and safeguards of judicial review become a mirage.

It is earnestly submitted that the lower court's opinion and decree does more than hurt this petitioner. It hurts good government, and the confidence of citizens in it. It can so easily be avoided by a judicial decision by this court which permits the Administrator to employ "competent subordinates" who are unbiased to aid him in digesting conflicting testimony and preparing appropriate findings. It is only required to exclude from the ranks of such "competent subordinates" the government's witnesses and at-

---

[16]Austern, the Formulation of Mandatory Food Standards, *supra*, p. 11.

torneys who had "buried themselves in one side" of an adverse proceeding by testifying, advocating, and preparing one side of a sharply controverted dispute.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Dated at Seattle, Washington, August 17, 1949.

Respectfully submitted,

ALBERT E. STEPHAN,
Counsel for Petitioner,
Willapoint Oysters, Inc.

GROSSCUP, AMBLER & STEPHAN,
711 Central Building,
Seattle 4, Washington,
Of Counsel.